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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MIGUEL VILLANUEVA,

Defendant and Appellant.

F073895

(Super. Ct. No. BF161323A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. John W. Lua, Judge.

Kendall Dawson Wasley, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Christopher J. Rench, Deputy Attorneys General, for Plaintiff and Respondent.

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Miguel Villanueva barricaded himself, with a semiautomatic gun, in a garage in a Bakersfield apartment complex. Initially, he fired at an officer through an open pedestrian door at one end of the garage. He subsequently fired at other officers through the tilt-up garage door at the opposite end of the garage. He was convicted on multiple counts of attempted murder of a peace officer and assault with a semiautomatic firearm on a peace officer, among other offenses. This appeal concerns three of his convictions for attempted murder as well as the sentences on firearm enhancements attached to all the attempted murder and assault with a firearm convictions.

Villanueva argues the trial court erroneously gave the jury a kill zone instruction with respect to two counts of attempted murder (counts 7 and 8), leading to convictions on both counts. He also argues the evidence was insufficient to support the convictions on these counts. We agree the kill zone instruction was both unwarranted and prejudicial and, further, that, under the circumstances, *two* attempted murder convictions were not supported by sufficient evidence on the kill zone theory or any other theory. Accordingly, we reverse the convictions on these counts. On remand the prosecution, in this context, may retry only one count of attempted murder.

Villanueva also challenges his conviction on another, separate count of attempted murder (count 3) for insufficiency of the underlying evidence. We agree the evidence was insufficient as to this conviction and reverse it as well.

Finally, as requested by Villanueva, in light of Senate Bill No. 620 (2017-2018 Reg. Sess.), we remand for resentencing on firearm enhancements attached to all the convictions for attempted murder and assault with a firearm.

PROCEDURAL HISTORY

On October 16, 2015, the Kern County district attorney filed an information charging Villanueva with 27 felonies. In counts 1 through 10, Villanueva was charged with the attempted murder of 10 officers, and in counts 11 through 20, he was charged with assault on a peace officer with a semiautomatic weapon, as to the same officers:

California Highway Patrol (CHP) Officers Jeremiah Lincoln (counts 1, 11), Brian Kazal (counts 2, 12), and Benjamin Ellis (counts 3, 13), and Bakersfield Police Officers Jeff Martin (counts 4, 14), Seth Palmer (counts 5, 15), Matthew Gregory (counts 6, 16), David Boyd (counts 7, 17), Christopher Feola (counts 8, 18), Keith Carson (counts 9, 19), and Mason Woessner (counts 10, 20). (Pen. Code, §§ 187, subd. (a), 664, 245, subd. (d)(2).)[1]

Attached to each *attempted murder* charge were allegations that Villanueva: (1) acted willfully, deliberately, and with premeditation (§ 189); (2) knew the targets were peace officers (§ 664, subd. (e)(1)); (3) personally discharged a firearm (§ 12022.53, subd. (c)); (4) personally used a firearm (§ 12022.5, subd. (a)); and (5) had incurred three prior felony prison terms (§ 667.5, subd. (b)).

Attached to each *assault* charge were allegations that Villanueva personally discharged a firearm (§ 12022.53, subd. (c)), personally used a firearm (§ 12022.5, subd. (a)), and had incurred three prior felony prison terms (§ 667.5, subd. (b)).

Villanueva was charged with seven additional felonies: unlawfully discharging a firearm at a motor vehicle (count 21; § 246), two counts of unlawfully discharging a firearm at an inhabited dwelling (counts 22-23; § 246), discharging a firearm in a grossly negligent manner that could result in death or injury (count 24; § 246.3, subd. (a)), evading a police officer (count 25; Veh. Code, § 2800.2), unlawfully driving a vehicle without the owner's consent (count 26; Veh. Code, § 10851, subd. (a)), and possession of a firearm by a felon (count 27; § 29800, subd. (a)(1)). Each of these charges was accompanied by three prior prison term sentence enhancements (§ 667.5, subd. (b)).

A jury acquitted Villanueva of five counts of attempted murder (i.e., the counts relating to Officers Kazal, Palmer, Gregory, Carson, and Woessner). Villanueva was convicted of the other five counts of attempted murder (i.e., the counts relating to Officers Lincoln, Ellis, Martin, Boyd, and Feola). In addition, Villanueva was convicted

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1 All further statutory references are to the Penal Code unless otherwise specified.

of nine counts of assault on a peace officer with a semiautomatic weapon; on count 12, pertaining to Officer Kazal, he was convicted of the lesser included offense of assault on a "person" with a semiautomatic weapon (§ 245, subd. (b)). Villanueva was also convicted of the remaining seven felony counts. The jury found true all enhancements attached to the counts of conviction (other than the prior prison term allegations, which were tried in a bifurcated court trial). The trial court, in the bifurcated trial, found true two of the prior prison term allegations; the remaining prior prison term allegation was found not true.

Villanueva was sentenced to an aggregate prison term of 75 years to life, plus 180 years.[2] He was sentenced to 15 years to life for each of his five convictions for premeditated attempted murder, along with 20 years for each of the attached section 12022.53, subdivision (c) enhancements and two years for the two prison prior sentence enhancements. On count 15 (assault on Officer Palmer with a semiautomatic weapon), he was sentenced to the upper term of nine years, along with 20 years for the attached section 12022.53, subdivision (c) gun enhancement, plus two years for two prison prior sentence enhancements. On each of counts 16, 19, and 20 (assault on Officers Gregory, Carson, Woessner), he was sentenced to two years four months, along with six years eight months for the attached section 12022.53, subdivision (c) gun enhancements. On count 12 (lesser included assault offense on Officer Kazal), he was sentenced to two years, plus three years four months on the attached section 12022.5 sentence gun enhancement. (His sentences on the remaining assault counts were stayed). On counts 21, 22, and 23, he was sentenced to one year eight months each and on counts 24, 25, and 26, he was sentenced to eight months each. (His sentence on count 27 was stayed.)

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[2] The correct indeterminate term – as calculated by adding up the sentences on the relevant, individual counts – is 172 years four months.

FACTS[3]

Prosecution Case

A. Villanueva Retreats to Garage after High-Speed Chase

On March 14, 2014, at approximately 2:45 p.m., CHP Officers Brian Kazal and Bradley Lamb, who had separate patrol cars, were debriefing after resolving a "parking complaint" in Bakersfield, when Kazal noticed Villanueva talking on a cell phone as he drove by in a black Toyota Camry. Kazal pursued Villanueva, activating his patrol car's lights and chirping his siren; Lamb followed in his patrol car. Kazal intended to "make a stop and issue a citation." However, Villanueva accelerated, reaching a speed of approximately 80 miles per hour, and ran several red lights. After almost colliding with other vehicles, Villanueva crashed the Camry into a parked car. When the officers reached the Camry, Villanueva was gone. The officers were ultimately directed to a garage in a nearby apartment complex, where Villanueva was holed up.

B. Villanueva Shoots at Officers from Garage

Officers Kazal and Lamb went to the garage and cleared the area around it. CHP Officers Benjamin Ellis and Jeremiah Lincoln arrived there as well, joining Kazal and Lamb. Lincoln and Kazal obtained, from the owner, the key to the pedestrian door on the west side of the garage (the door, which had a knob, was locked). Lincoln flung the door open, and said, "CHP. Come on out with your hands up." With Kazal behind him, Lincoln looked inside the garage. Just then a shot was fired; Lincoln saw a muzzle flash in the dark garage and heard a loud bang. The muzzle flash "back-lit" Villanueva, enabling Lincoln to see him squatting down, arms extended toward the door, holding a large gun. Lincoln and Kazal, along with other officers at the scene, pulled back, taking

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3 Facts that are not relevant to the issues on appeal are omitted from the factual summary.

up separate positions in a courtyard area next to the garage. The pedestrian door was left open, but the officers did not return gun fire at that time.

Officer Ellis was walking over from the other side of the garage (where the drive-through entrance and tilt-up door was located) when he heard the shot fired at Lincoln. He ran towards the side where Lincoln and Kazal were, i.e., where the pedestrian door was located and where the gunshot sound had come from. Officers Lamb and Bridges were there as well. The officers retreated and took cover at various spots in the same area of the courtyard. Ellis kneeled behind a stucco staircase, next to a bush, about 15 feet from the pedestrian door. Ellis stated: "I felt like I was all the way behind cover" (although the pedestrian door to the garage was open, Ellis had positioned himself so he could not see it). Ellis had come off motorcycle patrol and was wearing a "blue and gold" helmet; he was the only motorcycle officer in the area at that time. Ellis heard Villanueva say something to the effect of, "'I see you in the helmet behind the bush.'" Ellis testified that a "few seconds" *after* Villanueva made that statement, Ellis "heard a [second] gunshot." Ellis thought this shot was fired at him because it was louder than the other shot he had heard (however, when Villanueva shot at Lincoln, Ellis was in a different location, walking from the east side of the garage to the west side, where the pedestrian door was located). Ellis had never been shot at before, so he had no prior experience to help him evaluate where the shot was directed. Ellis also clarified that he did not hear or see a bullet hit the ground near him or kick up dirt. Ellis did not fire back because he "couldn't see the threat to fire back." Officers Kazal, Lincoln, Lamb, and Bridges were in the area as well.

Kazal testified he was about six feet away from Ellis and heard Villanueva make a comment to the effect, "'I can see your helmet'"; Lincoln reported that he heard Villanueva say, "I see you, mother fucker.'" Kazal testified he also heard one shot fired towards the courtyard, in the general direction of the officers; he stated: "I heard one shot – [¶] – towards us in the courtyard." Kazal added: "I thought I could hear

something hit, like, a rock hitting the wall behind us." He clarified the shot came in his general direction and landed somewhere generally behind him. Kazal did not actually see any bullet strike; nor did he have a precise sense of where it might have hit. None of the officers saw the bullet at any point; Kazal testified it would not have been possible to see the bullet flying through the air.

Lamb testified, regarding this shot (i.e., the shot into the courtyard), that it came two minutes after the first shot (i.e., the shot towards the door when Lincoln peeked in the garage). Lamb explained the second shot "went out through the west [garage] door that was opened[,] into the grass [courtyard] area." Lamb said of this shot, "we didn't see it strike anywhere," but "it sounded like it was on the west side because the garage – that man door … it was still open." Subsequently, four or five minutes later, Villanueva was able to close the pedestrian door or "man door." After Villanueva closed the door, he made comments to the effect, "Call of Duty, mother fucker."[4] Thereafter, he fired additional shots out the other side of the garage, into the alley into which the drive-through entrance opened. Lamb stayed in the courtyard for 20 to 30 minutes.

Lamb testified that the Mobile Video Audio Recording System (MVARS) in his patrol car captured, in audio format, the incidents that took place at the garage. The camera for the system is mounted next to the car's rearview mirror, facing forward. Regarding the audio, Lamb testified: "The patrol cars have the audio charging stations, and at the beginning of our shift, we remove the microphone and put it on our person." On the day of the incident, Lamb had the microphone in his "right front pocket." The recording of the incident was played for the jury during Lamb's testimony. Contrary to the officers' testimony about the order of events in relation to the shot in Ellis's vicinity (i.e., the second shot), the recording of the incident revealed that Villanueva fired *first*

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[4] Lamb testified that in using the term "Call of Duty," Villanueva meant, "[c]oming out in a gunfight." He explained that "Call of Duty" is a "popular video game" that "involves just gunfire."

and *next* made a comment about an officer in a helmet (i.e., Ellis). Specifically, Villanueva said: "Back up. Back the fuck up. Back up. Back the fuck up. (Unintelligible) over there with the helmet. I see you mother fucker, yeah (unintelligible). It's Call of Duty, baby, let's go. Call of Duty, mother fucker, yeah, back the fuck up."

The recording of the incident reflects that a K-9 unit was also at the scene. Lincoln shouted to Villanueva: "You ain't goin' nowhere, brother. I can promise you that. [It will be] [o]ne of two ways, your ass is gonna get bit or you can come out." After Villanueva shut the pedestrian door to the garage, Lincoln yelled, "You're trapped" and "You're not getting out any way." Villanueva responded, "I'm going out in a blaze" and "I ain't goin' to prison for life." Villanueva also asked for a cell phone to use to call his mother, adding: "Don't be tryin' to run up, I want a cell phone right now." At various points, Villanueva shouted, "I see that guy in the bushes, you better back the fuck up" and "In the alley, I see you mother fuckers. Now back the fuck up."

C. Villanueva is Subdued by Bakersfield Police Officers and SWAT Team

Officers Jeff Martin, Seth Palmer, and Sean Morphis of the Bakersfield Police Department arrived to take over from the CHP. Ultimately, Bakersfield SWAT officers replaced all CHP officers and also brought in a BearCat vehicle (an armored vehicle) to facilitate greater mobility and protection of the officers. Attempts were made to negotiate with Villaneuva, so as to persuade him to surrender. When these attempts proved unsuccessful, rounds of tear gas were fired into the garage, through the closed garage door.

During the tear gas deployment, SWAT team members Sergeant David Boyd and Detective Christopher Feola took cover behind the police BearCat vehicle, which was parked at some distance from, and at a sharp angle relative to, the garage. Feola was sitting cross-legged on the ground, while Boyd stood behind him. Villanueva fired a

single shot from the garage that landed a number of feet in front of Feola. Feola heard the bullet ricochet off the concrete in front of him.

When Villanueva did not emerge from the garage after numerous rounds of tear gas were launched at the garage, the police resorted to using "tri-chamber grenades" containing tear gas. An officer, riding on a different BearCat (one from the county sheriff's office), threw a grenade into the garage through a hole near the top of the closed garage door. Villaueva eventually opened the garage door, displayed his gun, and shot at SWAT officers and the BearCat. Officers returned fire. Villanueva was shot, fell to the ground, and was arrested. Villanueva was taken to the hospital. A .45-caliber Sig Sauer semiautomatic weapon was recovered from the site. Eight .45-caliber casings were found inside the garage.

D. Hospital Interrogation of Villanueva

When police subsequently interrogated Villanueva, he admitted he barricaded himself in the garage with a .45-caliber gun. He shot "[o]ut the door" when an officer "flung open" the pedestrian door to the garage. He did not shoot at the officer; he simply wanted the officers to know he had a gun. Later, when SWAT officers fired into the garage, he fired back through the "big" garage door. He never shot directly at an officer, although he was "talkin' out loud" and making statements to the effect, "I see you right there," and the like. He was "playing a mind game" as he could not actually see the officers. He only saw the officers a few times when he peeked out through the gap under the door. He was not going to "give up" but was hoping the officers would just kill him because he did not want to return to prison. He had used methamphetamine approximately 30 minutes prior to encountering the police.

Defense Case

Villanueva testified in his own defense. On the day of the garage incident, he smoked methamphetamine at various times and drove around Bakersfield. He also had a .45-caliber gun in the car. When the police got behind him, he accelerated because he

was afraid he would be sent to prison for possessing the gun. After he crashed the car, he fled to a nearby apartment complex and hid in a garage.

When a police officer opened a door to the garage, Villanueva shot at the officer's shadow; he only wanted to scare the officer. Villanueva paced around the garage as he heard a truck and a helicopter approach. He was suicidal. He wanted to obtain a cell phone so he could talk to his mother and then run outside and have the police kill him. He estimated that he fired more than four shots from the garage but was not trying to hit anyone or anything. After the garage was tear-gassed, Villanueva opened the door and fired one shot, hoping the officers would thereafter kill him.

DISCUSSION

I. Convictions for Attempted Murder of Officers Boyd and Feola (Counts 7, 8)

Villanueva argues the trial court prejudicially erred in giving the jury a "kill zone" instruction regarding counts 7 (attempted murder of Sergeant Boyd) and 8 (attempted murder of Detective Feola).[5] He further argues the evidence was insufficient to support his convictions on both these counts. He contends that, in light of the relative positions of Boyd and Feola, and the fact that Villanueva fired only one shot, the evidence supports, at best, only one count of attempted murder in relation to these officers. We agree with these contentions and, as Villanueva requests, reverse his convictions on counts 7 and 8 and remand for retrial at the prosecution's election. On remand, the prosecution may retry only one count of attempted murder.

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[5] Although defense counsel did not object to this instruction in the trial court, we will review the instructional error issue because, to the extent the court erred, the error would affect Villanueva's substantial rights. (See § 1259.) In light of our resolution of the issue on the merits, we need not address Villanueva's related claim of ineffective assistance of counsel.

A. Factual Background

Although CHP officers initially pursued Villanueva to the garage, as the standoff progressed, they were eventually replaced by SWAT officers from the Bakersfield Police Department. The Bakersfield Police Department also brought an armored BearCat vehicle (dark blue-gray in color) to the scene; another BearCat vehicle (tan-colored) from the Kern County Sheriff's Office was also present.

The garage that Villanueva was holed up in was the middle garage in a row of three garages, in a structure that was part of an apartment complex. The garages were bounded on the east side by an alley. The drive-through entrances of the garages, with regular, aluminum tilt-up doors, were on the east side, opening onto this alley; the alley itself ran north-south and, on its south side, connected to a residential street called Parkwood Court. The police BearCat vehicle was parked (at an angle) at the northwest corner of the intersection of the alley and Parkwood Court, facing northwest.

Feola testified he was sitting behind the police BearCat vehicle as depicted in photograph No. 653, in People's Exhibit No. 3 (the photograph is in the record on appeal).[6] In this photograph, Feola appears sitting cross-legged (with a rifle) behind the right or passenger-side rear corner of the BearCat (Boyd is not shown in the photograph). Feola testified that he sat in this position for "about an hour," while Officer Matthew Gregory fired tear gas rounds into the garage from an area near the BearCat. At one point during the deployment of tear gas shells, a single shot was fired in the direction of the BearCat. Feola testified: "I was seated behind the BearCat, and there was some yelling and then a – I heard a shot, and about probably two or three feet in front of me on the concrete, I heard a ricochet and then looked back at the garage and saw a fresh hole more towards the left side [of the garage door]." At trial, when shown a photograph of the

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6 People's Exhibit No. 3 contains a large number of photographs that were generated after the fact as part of a "walk through" or reenactment of the incident at the garage.

garage door with various bullet holes or holes made by tear gas rounds, Feola was unable to identify the hole he had observed upon seeing the bullet richochet near him. Feola indicated that no additional measures to provide protection for Feola and Boyd were taken following the bullet ricochet (he said he already had strategically placed a ballistic shield to protect them); rather, "the negotiators continued to negotiate with the individual inside the garage." Feola confirmed the garage door was closed when the shot resulting in the ricocheting bullet was fired.

Sergeant Boyd testified that he was also standing at the rear of the BearCat when this particular shot was fired. He said: "When the BearCat was parked here at a slight angle, I was to the rear and off the right corner of the BearCat next to Detective Feola, who was in a covering position off the right rear of the BearCat. I heard what I recognized as a gunshot. It appeared to come from the garage. And then approximately three to four feet to the right of myself and Detective Feola here on the roadway was a bullet strike." Boyd explained the bullet strike was at the "northeast corner of the alley and Parkwood Court," three or four feet "to [his] right," that is, "to the east of where [he] was standing." He added that, at the time, he was standing "behind and just slightly to the right of Detective Feola." In a variation from Feola's testimony, Boyd testified that a ballistic shield was later wedged under the rear corner of the BearCat to provide additional protection for them (Feola testified the ballistic shield was already there when the shot was fired). At the time the shot was fired, the police BearCat was the only BearCat in that area (the county BearCat had not yet arrived).

B. Kill Zone Instruction Given by Trial Court

Villanueva was charged with the attempted murder of both Boyd (count 7) and Feola (count 8) on account of the single shot that was fired from the garage in the direction of the BearCat, when tear gas shells were being fired at the garage from that area. The prosecution relied on the kill zone theory with regard to the attempted murder charges concerning Boyd and Feola (the charges were based on a single shot). The trial

court accordingly instructed the jury with a kill zone instruction. Specifically, after instructing the jury as to the elements of attempted murder ((1) the defendant took at least one direct but ineffective step toward killing another person and (2) the defendant intended to kill that person), the trial court further instructed:

> "A person may intend to kill a specific victim or victims and at the same time intend to kill everyone in a particular zone of harm or 'kill zone.' … [¶] … [¶] In order to convict the defendant of the attempted murder of David Boyd, the People must prove that the defendant not only intended to kill David Boyd but also either intended to kill Chris Feola, or intended to kill everyone within the kill zone. If you have a reasonable doubt whether the defendant intended to kill David Boyd or intended to kill Chris Feola by killing everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of David Boyd.
>
> "In order to convict the defendant of the attempted murder of Chris Feola, the People must prove that the defendant not only intended to kill Chris Feola but also either intended to kill David Boyd, or intended to kill everyone within the kill zone. If you have a reasonable doubt whether the defendant intended to kill Chris Feola or intended to kill David Boyd by killing everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of Chris Feola." (See CALCRIM No. 600.)

C. Legal Analysis of Villanueva's Claims

"Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing." (*People v. Superior Court* (*Decker*) (2007) 41 Cal.4th 1, 7.) Our Supreme Court has highlighted a critical distinction between the mental states required for attempted murder and murder, respectively: "Attempted murder requires express malice, i.e., intent to kill. Implied malice—a conscious disregard for life—suffices for murder but not attempted murder."[7] (*People v. Stone* (2009) 46 Cal.4th 131, 139-140 (*Stone*).) Furthermore, the doctrine of transferred intent applies to murder, whereby "a person who intends to kill is guilty of the

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[7] Express malice is shown when the defendant "'either desires the victim's death, or knows to a substantial certainty that the victim's death will occur.'" (*People v. Houston* (2012) 54 Cal.4th 1186, 1217; accord, *People v. Covarrubias* (2016) 1 Cal.5th 838, 890.)

murder of everyone actually killed, whether or not the person intended to kill each one." (*Stone*, *supra*, at p. 136.) In contrast, this doctrine does not apply to attempted murder because "[t]he crime of attempt sanctions what the person intended to do but did not accomplish," *People v. Bland* (2002) 28 Cal.4th 313, 327 (*Bland*), and thus "[a] shooter who fails to kill [an] *unintended* victim cannot be convicted of attempted murder under a theory of transferred intent." (*People v. Falaniko* (2016) 1 Cal.App.5th 1234, 1243 (*Falaniko*) (italics added).)

"[A] defendant who targets a specific person by firing a flurry of bullets into a crowd may nevertheless be convicted of attempted murder if the evidence shows he intended to kill everyone in the victim's vicinity in order to kill the intended victim. In such a scenario, the defendant is liable for attempted murder under a 'kill zone' or 'concurrent intent' theory rather than [the] transferred intent [doctrine]."[8] (*Falaniko*, *supra*, 1 Cal.App.5th at p. 1243.) Our Supreme Court has also held the kill zone theory to apply when the defendant has no specific target but shoots to kill everyone in a defined area, reasoning that "[a]n indiscriminate would-be killer is just as culpable as one who targets a specific person." (*Stone*, *supra*, 46 Cal.4th at p. 140; *Falaniko*, *supra*, 1

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8 This theory was postulated by our state high court in *Bland, supra,* 28 Cal.4th 313. *Bland* recognized that while transferred intent does not apply to attempted murder, a person who intends to kill a primary target may also be criminally liable for the attempted murder of a nontargeted individual based on concurrent intent. That is, "although the intent to kill a primary target does not *transfer* to a survivor, the fact the person desires to kill a particular target does not preclude finding that the person also, concurrently, intended to kill others within what it termed the 'kill zone.' 'The intent is concurrent … when the nature and scope of the attack, while directed at a primary victim, are such that we can conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim's vicinity.… Where the means employed to commit the crime against a primary victim create a zone of harm around that victim, the factfinder can reasonably infer that the defendant intended that harm to all who are in the anticipated zone.'" (*Bland, supra,* 28 Cal.4th at pp. 329-330, quoting *Ford v. State* (1993) 625 A.2d 984, 1000, disapproved on another ground in *Henry v. State* (2011) 19 A.3d 944, 951-952.)

Cal.App.5th at p. 1243.) "The kill zone theory is not a one-size-fits-all shortcut to establishing the requisite mental state for attempted murder, however. Indeed, the Supreme Court has emphasized that the theory is not a legal doctrine requiring special jury instructions at all, but rather, 'is simply a reasonable inference the jury may draw in a given case.'" (*Falaniko, supra,* 1 Cal.App.5th at p. 1243.) In short, the kill zone theory supplies an inferential path for convicting a person for multiple counts of attempted murder, which crime, in contrast to murder, always requires express malice or specific intent.

The kill zone theory is warranted when the specific intent to kill multiple people may reasonably be inferred from the circumstances. Thus, kill zone cases make clear that the kill zone theory applies when the nature and scope of the attack indicates that the perpetrator intended to kill multiple people as a means of killing the primary target or intended to kill everyone in a defined area; on the other hand, it does not generally apply when a single shot is at issue. (*People v. Perez* (2010) 50 Cal.4th 222, 232 (*Perez*) ["*Bland*'s kill zone theory of multiple attempted murder is necessarily defined by the nature and scope of the attack. The firing of a single bullet [normally] is not the equivalent of using an explosive device with intent to kill everyone in the area of the blast, or spraying a crowd with automatic weapon fire, a means likewise calculated to kill everyone fired upon. The indiscriminate firing of a single shot at a group of persons, without more, does not amount to an attempted murder of everyone in the group."]; *Falaniko, supra*, 1 Cal.App.5th at p. 1244 ["A conviction for attempted murder under a kill zone theory requires evidence that the defendant created a kill zone; that is, while targeting a specific person he attempted to kill everyone in the victim's vicinity, or he indiscriminately sought to kill everyone in a particular area without having any primary target."].)

Here, in contrast to a scenario where the defendant sprays gunfire indiscriminately towards a group of people (i.e., a classic "kill zone" scenario), only one shot was fired

towards the BearCat, behind which Boyd and Feola were taking cover. Although Villanueva clearly had the ability, and the means, to fire additional shots at the time (as shown by subsequent shots at other officers), he fired only one shot towards the BearCat. As discussed below, the caselaw makes clear that, *when one shot is at issue*, a kill zone instruction is warranted only where it may reasonably be inferred that the shooter intended to kill more than one person, which was not the case here.

In, *Perez*, *supra*, 50 Cal.4th 222, the California Supreme Court addressed whether a single shot could support two attempted murder convictions under a kill zone theory. *Perez* concluded the facts of the case did "not establish that [the] defendant created a 'kill zone' by firing a single shot from a moving car at a distance of 60 feet at [a] group of eight individuals, notwithstanding that they were all standing in relatively close proximity to one another." (*Id.* at p. 232.) The court noted there was no evidence the defendant targeted a particular individual in the group, intended to kill two or more persons with a single shot, or was thwarted from firing additional shots by circumstances beyond his control. (*Id*. at pp. 231-232; see *People v. McCloud* (2012) 211 Cal.App.4th 788, 800 (*McCloud*) [the defendant was convicted of 46 counts of attempted murder based on 10 shots fired into a crowd; the court reversed, holding, "[h]ere, as in *Perez*, 'the evidence is insufficient to establish that [the defendant] acted with the intent to kill two or more individuals' per shot fired"]; *Stone*, *supra*, 46 Cal.4th at pp. 136, 138 [kill zone instruction for attempted murder improper where the defendant fired *one shot* at a group of people, because "'[t]here was no evidence … that [he] used a means to kill the [alleged attempted murder victim] that inevitably would result in the death of other victims within a zone of danger'"]; *People v. Vang* (2001) 87 Cal.App.4th 554, 558, 564 [there was sufficient evidence of specific intent to kill everyone in residence, rather than just primary victim, where high-powered, wall-piercing, assault rifle was used to spray bullets at the residence; however, the court noted *the defendants' "argument might have more force if only a single shot had been fired"*] (italics added).)

Perez distinguished *People v. Smith* (2005) 37 Cal.4th 733, 739 (*Smith*), in which "the defendant was standing a few feet behind a car that was pulling away from the curb when he fired a single bullet through the rear windshield, hitting the driver's headrest and barely missing both the driver (the defendant's former girlfriend) and her three-month-old son, who was 'secured in a rear-facing infant car seat in the backseat' directly behind her." (*Perez*, *supra*, 50 Cal.4th at pp. 232-233.) Regarding *Smith*, *Perez* observed: "We concluded the presence of *both* victims in the shooter's direct line of fire, one behind the other, gave him the apparent ability to kill them both with one shot." (*Perez, supra,* 50 Cal.4th at p. 233; see also *People v. Leon* (2010) 181 Cal.App.4th 465, 457-458 [when defendant fired one shot into a car from behind, striking and killing a passenger seated in back seat, evidence was sufficient to also convict defendant of attempted murder of passenger seated directly in front of the murder victim and in the direct line of fire, but was insufficient to convict him of attempted murder of the driver of the car]; *People v. Chinchilla* (1997) 52 Cal.App.4th 683 [affirming two convictions of attempted murder based on the firing of a single bullet at two police officers who were crouched, one behind the other, *in the shooter's line of fire*].)

Here, Villanueva fired the shot at issue through the *closed* tilt-up door of the garage (Feola testified that he observed a fresh hole in the middle of the garage door, about "four and a half feet up" and "more towards the left," after the shot was fired). Although on a few occasions Villanueva pulled the garage door slightly to look out over its top or under its bottom, there was no evidence showing he could see Boyd and Feola at the time he fired the shot in question. Furthermore, the BearCat (behind which Boyd and Feola were sheltering) was parked at a considerable distance from the garage, in a location that was at an extremely tight oblique angle in relation to the garage. In addition, the point where Feola and Boyd observed the bullet strike or ricochet was a number of feet away from, and to the east of, the officers' location. Finally, Villanueva's location within the garage at the time he fired the shot is unknown as the garage door was

closed, making it impossible to know the trajectory of the bullet as it traveled from the garage to the area near the BearCat. Under these circumstances, it cannot be said that either officer was in the direct line of fire of the shot that was actually fired or that a person in the garage could reasonably have killed the two officers with one shot. As noted above, in this context, it is highly significant that the shot was fired from a considerable distance (see image No. 653 of People's Exhibit No. 3), through a *closed* garage door, and, furthermore, the point where Feola and Boyd observed the bullet strike or ricochet was a number of feet away from, and to the east of, their location. Additionally, even assuming Villanueva had seen the officers before he fired the shot through the garage door, here one officer was sitting cross-legged on the ground and the other one was standing upright, which factor (i.e., the disparate postures of the two officers) would by itself preclude a reasonable inference that Villanueva specifically intended to kill both officers with one bullet.

Given these circumstances, we conclude the present case is distinguishable from *Smith* and is better analogized to *Perez*. Applying *Perez*, there is no substantial evidence, as a matter of law, to support a theory positing that, by firing the single shot at issue, Villanueva specifically intended to kill *both* Boyd and Feola. In other words, the kill zone theory does not fit the facts. In turn, the court erred in giving a kill zone instruction with regard to counts 7 and 8. (*McCloud*, *supra*, 211 Cal.App.4th at p. 802 ["trial court erred by instructing the jury on the kill zone theory" where "[t]he record does not contain substantial evidence to support application of the theory in [the] case"]; *People v. Cole* (2004) 33 Cal.4th 1158, 1206 [court's instructional duty is triggered only when a theory is supported by substantial evidence]; *People v. Wickersham* (1982) 32 Cal.3d 307, 324 [substantial evidence is """evidence from which a jury composed of reasonable [people] could have concluded"' that the facts underlying the instruction did exist"], overruled on other grounds by *People v. Barton* (1995) 12 Cal.4th 186, 201; *People v. Singleton* (1987) 196 Cal.App.3d 488, 492 ["Trial courts are duty-bound to avoid instructions

which are not justified by the facts of the case, since they have a natural tendency to overburden and confuse the jury."].) Here, the kill zone instruction improperly permitted the jury to convict on counts 7 and 8 by finding, on the basis of the single shot, that Villanueva specifically intended to kill both Boyd and Feola.

Villanueva further claims the kill zone instruction was flawed because it permitted the jury to convict him on counts 7 and 8 *without* finding that he specifically intended to kill both officers. However, our conclusion that the record did not disclose substantial evidence to warrant the instruction does not automatically mean the instruction improperly modified the elements of the offense of attempted murder. On the contrary, here the jury was properly instructed on the elements of attempted murder, including under the kill zone theory. Accordingly, we will evaluate the prejudice arising from the erroneous instruction under the *Watson* standard of prejudice. (*McCloud*, *supra*, 211 Cal.App.4th at p. 803 [reviewing trial court's error in giving kill zone instruction under *Watson* standard of prejudice for state law instructional error]; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Even under *Watson*, the instruction was prejudicial because it improperly permitted the prosecution to posit the theory that Villanueva specifically intended to kill both Boyd and Feola with the single shot at issue, and to thereby secure two convictions based on the single shot. Further, given the circumstances, the evidence is insufficient to support two convictions for attempted murder under *any* theory (not just the kill zone theory). Finally, to the extent the record supports one count of attempted murder, we cannot say whether that would be the attempted murder of Boyd in count 7 or the attempted murder of Feola in count 8. Accordingly, we reverse Villanueva's convictions on both counts and remand the case. On remand, the People may retry only one count of attempted murder in this context. (See *Stone*, *supra*, 46 Cal.4th at p. 140 [indiscriminate firing of a single shot into a group of people supported one generic count of attempted murder]; *Perez*, *supra*, 50 Cal.4th at p. 222 [when a single shot is fired and "the evidence

shows an undifferentiated but potentially lethal hostility to all members of the group, an inference of an intent to kill any *one person* in the group arises, and a single count of attempted murder charged in that manner is proper"].)

In sum, the erroneous kill zone instruction was prejudicial to the extent it permitted conviction on two counts of attempted murder (i.e., counts 7 and 8) based on the single shot at issue. Furthermore, the evidence is insufficient to support the convictions on both counts 7 and 8 on any other theory as well. The matter is therefore remanded for retrial, at the People's election, on one count of attempted murder.

II. Sufficiency of the Evidence Underlying Count 3 (Attempted Murder of Ellis)

Villanueva argues his conviction in count 3 for the attempted murder of Officer Ellis must be reversed because it is unsupported by substantial evidence. We agree.

When the sufficiency of the evidence is challenged on appeal, "the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d. 557, 578.)

The facts relevant to this claim are outlined in the factual summary above. The attempted murder charge with respect to Ellis was based on a shot fired out the pedestrian door to the garage, into a courtyard area to the north and west of the garage. A number of officers were taking cover in this area, including Lincoln, Kazal, and Ellis, among others, when the shot was fired. Based on the recording of the incident that was introduced into evidence, right after the shot was fired, Villanueva made a statement to the effect, "Back up. Back the fuck up. Back up. Back the fuck up. (Unintelligible) over there with the helmet. I see you mother fucker, yeah (unintelligible). It's Call of Duty, baby, let's go. Call of Duty, mother fucker, yeah, back the fuck up." The helmet reference in the statement was directed at Ellis. Kazal testified, "I thought I could hear something hit, like, a rock hitting the wall behind us." However, this statement does not show that the

shot was directed at Ellis. Indeed, no one saw where the shot was directed. Similarly, Villanueva's position within the garage, at the time he fired the shot, was unknown. Under these facts, we conclude there was insufficient evidence for the jury to conclude, beyond a reasonable doubt, that in firing the shot, Villanueva specifically intended to kill Ellis. The conviction on count 3 is reversed.

III. Firearm Enhancements Under Sections 12022.53 and 12022.5

Senate Bill No. 620 (2017-2018 Reg. Sess.), signed by the Governor on October 11, 2017, and effective January 1, 2018, added the following language to the firearm enhancement provisions in sections 12022.5 and 12022.53:

> The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. (§§ 12022.5, subd. (c), 12022.53, subd. (h); Stats. 2017, ch. 682, § 1.)

The new legislation thus granted trial courts new discretion to strike firearm enhancements arising under sections 12022.5 and 12022.53.

Here, the jury found true, firearm enhancements under sections 12022.5, subdivision (a) and 12022.53, subdivision (c), in relation to several counts on which Villanueva was convicted. Villanueva argues the amendments to section 12022.5 and 12022.53 are retroactively applicable to his case under *In re Estrada* (1965) 63 Cal.2d 740, 745, because they potentially mitigate punishment. (See *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091 [applying Senate Bill No. 620 to case not yet final when law became effective]; *People v. Robbins* (2018) 19 Cal.App.5th 660, 678-679 [same].)

The People concede the amendments are retroactive under *Estrada* but argue that remand for resentencing is not necessary given that the trial court sentenced Villanueva to the upper term on one of the enhancements as well as consecutive terms on the non-life offenses and the counts on which the sentences were stayed.

People v. McDaniels (2018) 22 Cal.App.5th 420 considered the issue of when remand is appropriate for purposes of resentencing under Senate Bill No. 620.

McDaniels remanded the case for resentencing because "the record contain[ed] no clear indication of an intent by the trial court not to strike one or more of the firearm enhancements" under the amendments effected by Senate Bill No. 620. (*McDaniels, supra,* at p. 448; see *People v. Almanza* (2018) 24 Cal.App.5th 1104 [adopting the *McDaniels* approach and remanding to allow trial court to reconsider the sentence in light of the amendments to the firearm enhancement statutes].) We find the approach taken by the *McDaniels* and *Almanza* courts persuasive. Unless the sentencing court clearly indicated it would not have struck the enhancements in question if it could, determining what it would likely have done had it possessed the new discretion, is an inherently speculative enterprise.

Our conclusion that the amendments to the firearm statutes are retroactive presupposes a legislative determination that the mandatory imposition of enhancements under former sections 12022.5 and 12202.53 sometimes resulted in sentences that were too harsh. Here, at the time of sentencing, the 20-year firearm enhancements under section 12022.53 were mandatory and the court imposed them on convictions for attempted murder and assault on a peace officer with a firearm, without comment. Although the court imposed the upper term for one enhancement under section 12022.5, subdivision (a) (count 12), in amending this statute, the Legislature signaled that the sentences imposed under this statute were sometimes too harsh. In light of the new sentencing landscape effected by the amendments to the applicable statutes as well as the fact that the court imposed almost all the enhancements without comment, we must remand for resentencing on the firearm enhancements. (See *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391 [remanding for resentencing where the record "[does] not *clearly indicate* that [the trial court] would have imposed the same sentence had [it] been aware of the full scope of [its] discretion"] (italics added).)

DISPOSITION

The convictions on counts 3, 7, and 8 are reversed and the sentence is vacated. The matter is remanded for further proceedings consistent with this opinion. Retrial is not permitted with respect to count 3. With reference to counts 7 and 8, retrial is permitted on one count of attempted murder. The judgment is otherwise affirmed.

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SMITH, J.

WE CONCUR:

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FRANSON, Acting P.J.

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SNAUFFER, J.